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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 394.

FILBEN MANUFACTURING COMPANY, INC., BERNICE M. FILBEN, PATRICIA A. FILBEN, ROSEMARY H. FILBEN, DELORES C. FILBEN, AND BERNICE M. FILBEN, AS GUARDIAN OF PATRICIA A. FILBEN, ROSEMARY H. FILBEN AND DELORES C. FILBEN,

Petitioners,

vs.

ROCK-OLA MANUFACTURING CORPORATION OF DELAWARE AND ROCK-OLA MANUFACTURING CORPORATION OF ILLINOIS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL STATEMENT OF FACT.

As a matter of accuracy, we point out that there are no patents specifically listed in the Rock-Ola-Filben agreement, but merely a recital of patent applications owned by the two contracting parties (Rec. 10).

The license granted by each of the contracting parties to the other was limited to phonographs of the "Filben type" on the one hand, and to phonographs of the "Rock-Ola type" on the other hand (Rec. 11).

Batavia Metal Products, Inc., with whom Petitioner, Filben Manufacturing Co., Inc., entered into an agreement for manufacture of the licensed Filben phonographs, and U. S. Challenge Co. with whom the same Petitioner entered into an agreement for sale of all Filben phonographs, were virtually one and the same corporation, as is evidenced by the signatures to such agreements (Rec. 36, 41); by the fact that they were signed on successive days, namely November 1, 1945, and November 2, 1945 (Rec. 32, 39); by the physical Exhibits 5 and 6, annual reports of those two companies filed with the Secretary of State of Illinois in the year 1946; and by the testimony of Petitioners' witness Baskfield (Rec. 102, 103).

It was the entry into those agreements by Petitioner, Filben Manufacturing Co., Inc., which formed the gravamen of Respondents' complaint, which charged those agreements to be in effect an effort to transfer Filben's right to manufacture and Filben's right to sell under the Rock-Olo-Filben license agreement, and the Court of Appeals properly held that those agreements were in violation of the Filben license (Rec. 151, 152).

Prior to the trial of this cause, Petitioners were required to produce copies of any and all agreements entered into between them, or any of them and other companies or individuals, relating to the manufacture or sale of Filben phonographs. In compliance with that demand, there was produced an agreement (Exhibit 4) between Petitioner, Filben Manufacturing Co., Inc., and one Sam Mannarino (Rec. 43, *et seq.*).

At the trial, Baskfield (President of Petitioner, Filben Manufacturing Co., Inc.) testified that while that con-

tract had been signed by both parties to it, it had not been delivered and was not a binding and existing agreement (Rec. 94).

It now appears from the Affidavit of counsel for Petitioners included in the Petition, that others are now engaged in manufacturing and selling Filben phonographs, presumably under contracts of the sort complained of in the original Bill of Complaint in this case.

Only two simple issues are really involved in this controversy, and of those, only one appears to be before this Court.

The two real issues before the lower Courts were:

(1) The right of the Filben heirs, Petitioners, under the Filben-Rock-Ola contract to assign their interest in that agreement to the Filben Manufacturing Co., Inc., Petitioner,

and

(2) The right of the Filben Manufacturing Co., Inc., Petitioner, or any of the Petitioners, to vest in others the right to manufacture Filben phonographs under the Filben-Rock-Ola agreement, and similarly, the right to sell Filben phonographs under that agreement in the manner provided in the contract entered into between Petitioner, Filben Manufacturing Co., Inc., and U. S. Challenge Co.

As to the first issue, Petitioners contend that the Court of Appeals was in error in holding that the Filben heirs did not succeed to Filben's right under the Filben-Rock-Ola agreement to assign his interest in that agreement to a corporation organized and controlled by him.

The contract is clear and unambiguous with respect to the rights of the heirs acquired by inheritance from licensee, Filben:

> "The license herein granted to Filben shall be non-transferable except to a corporation organized and controlled by Filben, or except to Filben's heirs or legal representatives" (Rec. 12).

In short, while Filben was given a right to assign, that right was not extended to his heirs.

Petitioners' challenge of the decision of the Court of Appeals to that effect is based wholly upon an alleged mutual mistake by the original contracting parties, Filben and Rock-Ola Manufacturing Corp.

In so contending, Petitioners are virtually conceding that there is no ambiguity or uncertainty or lack of clarity in the provision of the contract quoted above.

In other words, *mutual* mistake must be proved for Petitioners to obtain a sanction of the alleged right of the Filben heirs to vest their interest in the Rock-Ola-Filben agreement in the Petitioner, Filben Manufacturing Co., Inc.

As to the second issue outlined above, the Court of Appeals' holding found that Petitioners had no right to enter into agreements of the sort which were entered into with Batavia Metal Products, Inc., and U. S. Challenge Co.

There is nothing presented to the Court in the Petition before it on this issue, except that under "Questions Presented" appears the following:

> "V. Whether the court of appeals erred in construing the license agreement so as to preclude the petitioners from contracting with others for the manufacture of phonographs embodying the licensed patents, or for the sale to others of all of the phonographs manufactured by or for the petitioners" (Pet. 5).

Since no argument or reasoning is included in the Petition, we submit that the question is not before this Court, and will not be considered by this Court in line with its customary practice in dealing with such Petitions.

Incidentally, as to the issue of Petitioners' right to divide and transfer the right to manufacture and the right to sell, the law to be applied to the construction of the Rock-Ola-Filben agreement in that respect is general or Federal law, and not a matter of State law since it is purely a matter of patent license interpretation, just as was the question of licensee-estoppel and illegal licensee restriction in the cases of *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, and *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402, respectively.

The decision of the Court of Appeals is not in conflict with the Minnesota law or authorities.

Throughout both Minnesota decisions and Federal decisions bearing upon the question of mutual mistake in the drafting of contracts, runs a common thread. That is the repeated insistence by both State and Federal Courts that **mutual mistake of such character as to warrant a reformation of a contract, must be clearly and convincingly proved.** That, as we shall point out, was not done in the case at bar, as the Court of Appeals clearly recognized.

It is repeatedly asserted in Petitioners' argument that the Court of Appeals disregarded and ignored the law of Minnesota as established by decisions of the highest Court of that State.

We point out that briefs of the Defendants below were replete with citations of Minnesota authorities; *i. e.*, decisions of the Minnesota Supreme Court. To imply that the Court of Appeals did not give consideration to these decisions seems to us a slur upon the Court and an attack upon its conduct of the case.

It is also asserted:

> "* * * that although the district judge has had long experience with Minnesota law, none of the judges

of the court of appeals had been Minnesota attorneys'' (Pet. p. 18).

We do not know the basis for this statement. Certainly nothing in the record justifies it or supports it.

To imply, as is done in this statement, that the Court of Appeals is not acquainted with Minnesota law is absurd in the extreme. As this Court will recognize, that Court of Appeals has been sitting in Minnesota for many years, and it is inconceivable that it has not been confronted with questions of Minnesota law upon contractual and other issues over its period of existence.

If, as we submit, Federal citations relied upon by the Court of Appeals are in line with the weight of authority of the Minnesota Supreme Court, we see no reason why citation of Minnesota cases was required of that Court.

The Federal or general law respecting mutual mistake as a basis for reformation of a contract, does not differ fundamentally from the law as applied by the highest court of the State of Minnesota in many decisions.

Fundamentally, both Federal law and Minnesota law follow the doctrine set forth in Williston on Contracts, Vol. 3, p. 2820, in the following words:

> ''Though equity will not permit the parol evidence rule to prevent it from granting relief for mistake, 'the purpose of a written contract is to furnish a record of the terms of the agreement of the parties not easily impeached, and thereby to avoid subsequent disputes and conflicting testimony and claims regarding its terms and their meaning. To accomplish this purpose, and to prevent such disputes from annulling written agreements, two rules have been firmly established in equity: First, that the burden is on the complainant to prove the mutual mistake, or the mistake of one party and the deceit, fraud, or inequitable conduct of the other, upon which he relies for a modification or avoidance of the contract; and,

second, that in view of the written record of the terms of the agreement made at the time a preponderance of the evidence is insufficient, and nothing less than evidence that is plain and convincing beyond reasonable controversy will constitute such proof as will warrant a modification or reformation of a written agreement'."*

Likewise, the Minnesota courts have repeatedly held that to find mutual mistake warranting a judicial reformation, proofs must be clear and convincing. In many, if not all, of the authorities relied upon by Petitioners, extrinsic facts have been present in the cases which substantiated and corroborated the testimony accepted and relied upon by the courts. There are no such extrinsic facts in the case at bar to support or substantiate the flimsy and indefinite testimony of Baskfield, president of the Petitioner Company and attorney for the late Filben, who collaborated in the negotiation for the drafting of and the consummation of the Rock-Ola-Filben agreement.

Lacking ambiguity in the phrasing of that contract, the Court of Appeals was fully justified in departing from the findings of the lower Court, insofar as they imply anything in the nature of mutual mistake in the drafting of that agreement.

In *Leach* v. *Leach et ux.*, 202 N. W. 448, there had been a trial by jury in the lower Court, the jury finding that a certain promissory note being sued upon, was intended to represent an advancement to the Defendants, or one of the Defendants, son of the Plaintiff.

It is to be noted that the Minnesota Supreme Court found it proper and desirable to give consideration to the evidence which was before the jury in the lower Court. This is evidenced by the following language:

"*In examining the evidence, we* have kept in mind the rule * * * that when a voluntary gift of prop-

* Quoting from *Bailey* v. *Lisle Mfg. Co.*, 238 Fed. 257, 266.

> erty is claimed, the claim should be subjected to close scrutiny and rejected unless supported by satisfactory and convincing evidence, and *have concluded* that the evidence was sufficient to warrant the jury in finding that Appellant gave the money to her son as an advancement." (l. c. 450—emphasis ours.)

One of the earlier cases relied upon by the Minnesota Court in the case from which we have just quoted, is *Scofield* v. *Quinn*, 55 N. W. 745, where the Supreme Court of the State reversed the lower Court after consideration of the proofs with respect to a deed and a written instrument, finding that there was ground for the intervention of equity to protect the real purpose of the original contracting parties, mother and daughter.

The Court in this last cited case, referred to a still earlier case, *Benson* v. *Markoe*, 33 N. W. 38, in which is laid down the general rule as to the necessity for clear and convincing proofs in cases presenting an issue of mutual mistake, set forth in the following words:

> "But this jurisdiction will be exercised with caution, *Only very clear and convincing proofs will be sufficient to overcome the presumption that the written instruments which parties have executed for the purpose of evidencing and carrying into effect their agreements, are in legal effect, or in terms contrary to their intention*" (l. c. 40—emphasis ours).

Again, in *Segerstrom* v. *Holland Piano Mfg. Co.*, 192 N. W. 191, the Minnesota Court announced the same rule:

> "Equity will not reform a written instrument on the ground of mistake, unless the evidence is clear and convincing (citing cases).
>
> • • • The evidence in this case very clearly sustains the finding that the verbal agreement of the parties was as Plaintiff claims" (l. c. 192).

There, there was found mutual mistake on the part of both parties to an agreement, as to the effect of certain words

which were used in the agreement, and the Court pointed to extrinsic facts which supported the Plaintiff's contention and the testimony in support thereof.

In *Wall* v. *Meilke*, 94 N. W. 688, the Minnesota Court also stated and recognized the requirement as to evidence required to justify a reformation, in the following language:

> "* * * the true rule is that equity will not reform an instrument on the ground of mistake, unless the evidence is clear and convincing, * * *" (l. c. 692).

In *Papke* v. *Pearson*, 280 N. W. 183, the Supreme Court of Minnesota again cited and relied upon *Benson* v. *Markoe, supra* for the rule with respect to reformation of agreements on the ground of mutual mistake by the parties. Incidentally, the Supreme Court obviously took occasion to review and weigh the evidence before the lower Court with respect to the intention of the contracting parties, and held:

> "Since the evidence is conclusive that such was the intention, the findings and conclusions should be modified in conformity therewith. * * *
> * * * The order as modified is affirmed" (l. c. 186).

In *Wilmot* v. *Minneapolis Automobile Trade Association*, 210 N. W. 861, relied upon by Petitioners, there was ambiguity in the contract before the Court, and the Court turned to testimony that the accounting practice which had been followed by the parties for years, was the proper practice to rely upon in determining the ambiguity in the agreement.

In Re Soper's Estate, 264 N. W. 427, the Court cited the *Wilmot* case, (*supra*) and approved the use of parol evidence to determine that the term "wife", as used by the settlor of an insurance trust, properly meant the woman

to whom he had been illegally married and with whom he was living openly in the pseudo-relation of man and wife at the time the trust was executed. In that case, obviously there was an element of ambiguity, but the extrinsic facts were relied upon in the appraisal of the parol testimony in enabling the Court to resolve that ambiguity to determine real intent of the settlor.

In *City of Marshall* v. *Gregoire*, 259 N. W. 377, the Court construed a bond protecting the City with respect to the performance of its Treasurer. The bond contained the provision that the Treasurer "shall well and faithfully perform all the duties of his said office". There was also included an exemption of the surety for loss "caused by the failure of any bank, institution, or depository of any kind" to repay City funds deposited with it. The Treasurer, in violation of a State Statute, deposited City funds in a bank of which he was a stockholder, director, and assistant cashier. The bank failed.

The Court held that by violating the State Statute and depositing the City funds in such bank, he had not "well and faithfully" performed his duty in accord with the condition of the bond.

The Court did not specifically find mutual mistake.

Petitioners have also cited *Burnet* v. *Hopwood et al.*, 244 N. W. 254. In that case, the Minnesota Court construed a partnership agreement as to which there was a controversy between the parties as to the division of the partnership funds upon withdrawal of one partner.

The Court noted that for several years distribution of the profits had been on a certain percentage basis and this was continued after entry into a partnership contract.

The Court pointed out that where certain language in the agreement was capable of different constructions, the Court was empowered to adopt that which was most reasonable in view of the facts and the conduct of the parties.

Acquiescence and conduct of the parties was also adverted to.

There was really no issue of mutual mistake in this cited case; rather, one of construction of certain language in the agreement.

The case is of interest in the enouncement by the Court of the rule which we believe to be pertinent to the case at bar. We quote from the syllabus by the Court, as follows:

> "3. Where the wording of a written contract is unambiguous, the intention of the parties must be deduced from the language used. If the language is susceptible of different constructions, as far as reasonably possible, a construction is to be avoided which would lead to unjust or absurd results" (l. c. 254).

It is to be noted in this last cited case, that the Supreme Court took upon itself to review the evidence before the lower Court, whose findings and decisions were reversed.

In *A. E. Little Co.* v. *John W. Thomas, Inc.*, 218 N. W. 242, it is to be noted that the Supreme Court of Minnesota did not hesitate to review the evidence and testimony which had been adduced before the lower Court and to reach an opposite conclusion, which led it to reverse the lower Court. In short, the findings of the lower Court were not held binding upon the Supreme Court of the State.

In that case, there was a question as to the import and meaning of the term "extended", as applying to a lease between parties. The Supreme Court found that the extension of the lease contemplated by the agreement was a formal extension, and did not cover a permissive occupancy or tenancy from month to month, without any formal extension of the lease. There is no pertinence in that case to the contentions of the Petitioners here.

It is to be noted in passing that a number of the Minne-

sota cases relied upon by Petitioners presented situations where one or the other, or both, of the contracting parties did not utilize the services of a lawyer. In some cases, there was a family relationship which exercised some measure of influence upon the Court, and in others were involved insurance policies, in which the Minnesota Courts are prone to lean heavily upon the side of an insuree, particularly where there was misrepresentation and he could not, or did not, understand some of the terms of his policy.

The Court of Appeals in the case at bar, took occasion to point out that:

> "The parties to the license agreement were *sui juris*; each of them was represented by his own counsel during the negotiations leading up to the making of the agreement and at the time of its execution" (Rec. 146).

The Court then pointed to the rule as defined in an earlier decision, *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co.*, 23 F. 2d 628.

Apparently recognizing the handicap imposed upon Respondents and upon the Appellate Court by the failure of the District Court to accompany its findings and conclusions with an opinion, the Court of Appeals also said:

> "It is argued by Defendants that the right of reformation may be used defensively, and that it was so used here by Defendants in the trial at Court. One of the troubles about this argument is that the trial Court did not purport to grant reformation of the contract, but construed it as granting to the Filben heirs the same rights as possessed by him during his lifetime, including the right to transfer to a corporation organized and controlled by them. There is nothing to indicate that the Court reformed the contract as written; neither did the Defendants seek such reformation" (Rec. 149).

Judge Nordbye of the District Court of Minnesota, in

Preferred Accident Insurance Co. of N. Y. v. *Onali et al.*, 43 F. Supp. 227, applied the rule in words which reiterate the decisions of the Minnesota Supreme Court:

> "At the outset, in discussing the question of defendant Onali's right to a reformation of the contract, it is generally recognized that before a court of equity will reform a written instrument, it must appear that there was an antecedent agreement and that the writing failed to express the true intention due to a mutual mistake, or a mistake on one side and fraud or inequitable conduct on the other. *Further, these facts must appear by clear and not doubtful evidence. Norman* v. *Kelso Farmers' Mutual Fire Ins. Co.*, 114 Minn. 49, 130 N. W. 13" (l. c. 231—emphasis ours).

In still another case, the Minnesota Supreme Court was considering an asserted mutual mistake in the formation of an insurance contract and pointed out that it must appear that there was, in fact, a written contract which failed to express the true intentions of the parties thereto, and that this failure was due to mutual mistake, or to a mistake on one side and fraud or inequitable conduct on the other. The Court referred to and quoted from a still earlier case, *Fritz* v. *Fritz*, 102 N. W. 705, from which it quoted the rule which is applicable to the case at bar:

> "'(b) These facts must be established by competent evidence, which is consistent and not contradictory, clear and not equivocal, convincing and not doubtful.'" *Norman* v. *Kelso Farmers' Mutual Fire Ins. Co.*, 130 N. W. 13.

The Court of Appeals was fully empowered to reject the disputed findings and conclusions of the District Court and was fully justified in so doing.

It is repeatedly insisted by Petitioners that the findings and conclusions of the District Court are, or were, binding upon the Court of Appeals and should have been accepted by that Court without question.

To state that contention seems to us to make manifest its absurdity.

We have no quarrel with the general practice of the Courts in accepting findings of a lower Court where they are supported by competent and adequate evidence. In this case they were not.

The lower Court did not specifically find that there was mutual mistake in the drafting of the Filben-Rock-Ola agreement. It did hold without an opinion, that it was the "intent of the parties to grant, and that there was granted to Filben's heirs the right to transfer and assign their license rights to a corporation controlled by them" (Rec. 122).

As to that, the Court of Appeals pertinently pointed out:

> "The parties to the license agreement were *sui juris;* each of them was represented by his own counsel during the negotiations leading up to the making of the agreement and at the time of its execution. There was no claim of over-reaching, fraud, or mutual mistake" (Rec. 146).

While Petitioners apparently do not agree with the holding that there was no claim of mutual mistake, they have not challenged the indisputable fact that there was no claim and can be no claim of over-reaching or fraud.

Therefore, mutual mistake must be shown and established by adequate proof to justify a right of reformation of the Rock-Ola-Filben agreement.

Now let us review the scanty proof upon which Petitioners base their claim of mutual mistake.

It consists entirely of the testimony of Leonard Baskfield. It should be kept in mind that Baskfield had been long engaged in practice of law and had been long associated with Filben when he collaborated and assisted in the drafting of the Filben-Rock-Ola agreement (Rec. 68, 69).

Several meetings were had between Baskfield and the patent attorney for the Respondents, James A. Davis of Chicago, with the purpose of agreeing upon the terms of a cross-license arrangement between the late Filben and Rock-Ola Manufacturing Corp. (Rec. 69, 70).

Mr. Baskfield continued the phonograph business of Filben after the death of the latter, for Filben's heirs, under the fictitious name previously adopted by Filben, Filben Manufacturing Co. (Rec. 98), and in that capacity conducted the manufacture and sale of "upwards of a thousand" phonographs prior to his entry into the armed services (Rec. 101, 102).

Upon the formation of Petitioner, Filben Manufacturing Co., Inc., by Baskfield in October, 1945, Baskfield became president and was issued 49 per cent of the stock in that corporation, which currently has been reduced to 33 per cent (Rec. 90, 103, 106).

So it is clear from the admissions of Baskfield himself, that he is definitely an interested party, and his testimony should be evaluated in the light of that fact.

The Rock-Ola-Filben agreement began to take form, according to Baskfield, at a meeting in the office of Filben's patent solicitor (Rec. 70), and a draft was dictated jointly to that solicitor's help by Mr. Baskfield and Mr. Davis. After subsequent telephone calls and correspondence, Mr. Baskfield states that further discussion was had with re-

spect to the rights to run to Filben's heirs (Rec. 71), and that he requested "that something be done to take care of the heirs so they would stand in the shoes of Mr. Filben."

Parenthetically, it may be said that the heirs would ultimately stand in the shoes of Mr. Filben after his death, in some degree, when they succeeded to his license under the Rock-Ola-Filben agreement.

Baskfield boldly testified that he assumed that the heirs would "stand in the shoes of Mr. Filben in the event of his death" (Rec. 72, 73).

Mr. Baskfield's answer to questioning and direct examination in one portion thereof is of interest:

> "Q. Did you have any conversation with Mr. Davis with respect to the question as to whether or not the language actually employed by him in paragraph 4 would confer upon Filben's heirs the same rights that the agreement conferred upon Mr. Filben?
>
> A. Your question is, did we have any conversation regarding that?
>
> Q. Yes, sir.
>
> A. Well, we have discussed it frequently over the years since then. *I don't recall if we had any then*" (Italics ours—Rec. 72).

That testimony clearly indicates an attempt by Baskfield to avoid a direct and unequivocal answer that both he and Mr. Davis were agreed and had the intent that the Rock-Ola-Filben agreement should extend to Filben's heirs his right to assign his interest under the Rock-Ola-Filben agreement to a corporation owned and controlled by him.

It is conceivable that Mr. Davis did agree that the proposed contract should provide for succession by the heirs to Filben's interest in that contract, and to that extent "stand in his shoes." It is inconceivable, however, that any lawyer of at least average intelligence and experience

would not recognize at a glance that the contract, as ultimately drawn and signed by Filben and Respondent, did not provide for the succession of Filben's heirs to the right to assign their interests in that contract to a corporation, as has been attempted in the case at bar.

Mr. Rockola, president of Respondents, was asked in cross-examination:

> "Q. Did you intend, Mr. Rockola, at that time that Mr. Filben's heirs should possess the same rights that Mr. Filben possessed under the agreement?"

His answer was succinct and to the point:

> "A. No" (Rec. 67).

Mr. Davis, who represented the Respondent in negotiation for and drafting of the Rock-Ola-Filben agreement, was interrogated, and we quote briefly from the testimony:

> "Q. Now, coming to the matter of your intent with respect to limitations upon the license granted to the late Mr. Filben, will you state what it was?
>
> A. The intent was to limit that license to an individual having a relatively small business, or to a corporation organized and controlled by him, the license itself was to descend to the heirs of Mr. Filben.
>
> Q. Was there any intent in your mind or activity with respect to the consummation of this agreement that the right to assign to a corporation the interests inherited by the Filben heirs should be vested in them?
>
> A. Certainly not" (Rec. 113).
>
> * * * * *
>
> "Q. Is there any particular reason why you were willing to permit this license agreement to descend to his (Filben's) heirs, but not to a corporation owned or controlled by his heirs?
>
> A. Yes" (Rec. 116, 117).

So we have as proof of the alleged mutual mistake in the drafting of the Rock-Ola-Filben agreement only the vague and somewhat equivocal testimony of Mr. Baskfield, defi-

nitely an interested party, and the lawyer who was closely associated with Mr. Filben and who represented him in negotiations for and the consummation of the agreement, and this is definitely and clearly controverted, insofar as it may support a contention of mutual mistake, by the unequivocal testimony of Mr. Rockola and Mr. Davis.

Certainly, here is no "clear and convincing proof" establishing that there was, in fact, mutual mistake in the drafting of the agreement.

As we have asserted before, the Court of Appeals did not depart from the fundamental principles or doctrines applied by the Supreme Court of Minnesota in the decision of cases involving a charge of mutual mistake in the drafting of an agreement, when it said:

> "The mistake must be mutual, or unilateral mistake induced by fraud. There must be in effect an agreement which the written instrument evidences, and the mistake must have been in drafting of the instrument, not in making of the contract" (Rec. 150).

It is interesting to note the contrast between the position of District Judge Bell in deciding the case at bar, and his position in his decision in the recent case of *Northern Pac. Ry. Co.* v. *United States*, reported at 70 F. Supp. 836, wherein there was before him a contract between the Railway and the United States, the parties being in disagreement as to freight rates charged against Defendant. While the decision is a lengthy one, it is only necessary to point out that the Court was confronted with the necessity to determine whether the contract between the parties was to be limited to construction activities of a low dam (Grand Coulee). We quote excerpts from that decision which we deem pertinent to the instant case, and Petitioners will hardly have the temerity to argue that Judge Bell was not familiar with the law of the State of Minnesota:

"The meaning of a contract should be ascertained from the language of the written instrument itself, and where the provisions are plain and unambiguous the contract is conclusive" (citing cases, including a Minnesota case) (l. c. 848).

* * * * *

"A Court will not resort to rules of construction where the intent of the parties is expressed in clear and unambiguous language" (again citing cases) (l. c. 849, 850).

* * * * *

"When a contract is reduced to writing, all matters of negotiation and discussion on the subject antecedent to and dehors the writing, are excluded as being merged in the instrument" (cases) (l. c. 855).

* * * * *

"Where reformation is sought because of the mistake of one party only, it is essential that fraud be found in the other, and that the fraud was perpetrated to induce the making of the contract, and although a ground for rescission and cancellation, it is not ground for reformation" (l. c. 866).

It is to be noted that in support of the last quoted excerpt, Judge Bell included among cases cited as supporting it, *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co., supra.*

There was no incongruity or absurdity in denying to the Filben heirs, the right to assign their license to a corporation controlled by them.

The record makes quite clear the fact that Filben was only functioning as an operator of coin-controlled phonographs prior to his death (Rec. 98, 99); whereas, following his death, Baskfield, as representative of the heirs, manufactured and sold "upwards of a thousand" Filben phonographs several years prior to the organiaztion of Petitioner, Filben Manufacturing Co., Inc. (Rec. 101). Incidentally, the sales were never reported under the Rock-

Ola-Filben agreement, nor was any tender of royalties made (Rec. 102).

Obviously, if the business of the late Filben could be extended to the substantial manufacture of these licensed phonographs by or on behalf of the heirs after Filben's death, it can hardly be argued logically that there was anything onerous or incongruous in the restriction imposed upon the heirs which precluded their assignment of their license rights to a corporation.

If business or other conditions since that time work a hardship upon the heirs, that cannot be blamed upon Respondents or treated as anything material or relevant to the charge of mutual mistake in the drafting of the agreement.

The Affidavit accompanying Petitioners' Petition and the allegations with respect to subsequent infringement suits instituted by Petitioners against infringers not parties to this suit are wholly irrelevant and impertinent.

We shall not argue the propriety generally of endeavoring to inject collateral facts and issues into this controversy by Affidavit of counsel, wholly unsupported by the record, but we do insist that the assertions relative to the filing of infringement suits subsequent to the decision of the Court of Appeals and the possibility of a volume of litigations are *dehors* the record and the issues in the case at bar and are wholly impertinent.

Certainly, Respondents cannot be denied the right to assert their patents against those whom they deem to be infringers, particularly, where such infringers are not parties to this suit.

We could counter the Affidavit complained of with other Affidavits, but we consider it would merely impose an unnecessary burden upon the Court, and would be entirely

uncalled for in view of the impertinence and irrelevance of Petitioners' Affidavit and the allegations based upon it.

Conclusion.

In conclusion, we submit that:

(1) The rule under the Minnesota law in cases involving reformation of contracts requires at least clear and convincing proof of mutual mistake.

(2) The holding of the Court of Appeals was entirely consonant with the rule applied by the Minnesota State courts where reformation of an agreement is sought, or the right to reform is relied upon, as is made amply clear by reference to the Minnesota Supreme Court decisions.

(3) The Court of Appeals was entitled to review the record in the case and to find, as it did, that the findings and conclusions upon which the District Court based its decision in favor of Petitioners were unwarranted and unsupported by adequate and convincing proofs, and in so doing, to decide adversely to the decision of the District Court.

(4) The wholly unsupported and controverted testimony of an interested party, a lawyer who participated in the drafting and consummation of the Rock-Ola-Filben agreement, was insufficient to establish mutual mistake in the drafting of that agreement, particularly in view of the rebuttal testimony of two other witnesses of Respondents, and more particularly in view of the plain, clear, unambiguous reading of the Rock-Ola-Filben agreement as to those portions which are involved in this controversy.

(5) There would be no security or sanctity in a formal written agreement if at any time the lawyer for one party who participated in the drafting of such a contract, were permitted to broaden its scope and extend the rights granted to one party by mere verbal

testimony, of the character offered here by Mr. Baskfield, in defiance of the plain and unambiguous reading of such contract.

We respectfully submit that the Petition for Writ of Certiorari should be denied.

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Attorney for Respondents.